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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91219959
Party	Plaintiff Universal Protein Supplements Corporation dba Universal Nutrition
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Universal Protein Supplements Corporation,

Opposer,

v.

Fitness Publications, Inc.,

Applicant.

Serial No. 86/026,728

Opposition No. 91219959



Mark:

**OPPOSER'S REPLY IN SUPPORT OF MOTION TO STRIKE
& SUSPEND PROCEEDINGS**

Universal Protein Supplements Corporation d/b/a Universal Nutrition (“Universal”), through its counsel, Marshall, Gerstein & Borun LLP, hereby submits the following reply in support of Universal’s Motion to Strike & Suspend Proceedings filed on June 24, 2015 (“Motion to Strike”).

I. Applicant’s rights in the “ARNOLD” Marks and Mr. Schwarzenegger’s name are not a legal equivalent of either Applicant’s mark at issue or Universal’s mark.

In its Opposition to Motion to Strike filed on July 17, 2015 (“Opposition”), Applicant Fitness Publications, Inc. (“Applicant”) argues that its allegations concerning rights in the “ARNOLD” marks and Mr. Schwarzenegger’s name are relevant to its false suggestion of a connection claim because they establish Applicant’s rights in Mr. Schwarzenegger’s name and likeness. (Opposition, Dkt. No. 14, pp. 6-7.) Essentially, Applicant argues that the “ARNOLD” marks and Mr. Schwarzenegger’s name constitute a legal equivalent of Universal’s bodybuilder design shown in U.S. Registration No. 4,483,690 (the “Bodybuilder Design”) (*i.e.*, the Bodybuilder Design and the “ARNOLD” marks and Mr. Schwarzenegger’s name are likely to impress the same mental image on purchasers). *See, e.g.*, Trademark Manual of Examining Procedure (“TMEP”) § 1207.01(c)(i) (“Under the doctrine of legal equivalents, which is based

on a recognition that a pictorial depiction and equivalent wording are likely to impress the same mental image on purchasers, a design mark may be found to be confusingly similar to a word mark consisting of the design's literal equivalent."); *see also In re Rolf Nilsson AB*, 230 U.S.P.Q. 141 (TTAB 1986) (likelihood of confusion found between applicant's mark, a silhouette of a lion's head and the letter "L" for shoes, and registrant's mark, LION for shoes). However, Applicant has not put forth any allegations or evidence that the "ARNOLD" marks or Mr. Schwarzenegger's name constitute a legal equivalent of the Bodybuilder Design or even Applicant's mark shown in Serial No. 86/026,728 (the "Opposed Mark"). *See Eagle Clothes, Inc. v. Robert Lewis Inc.*, 165 U.S.P.Q. 266 (PTO 1970) ("We find that we cannot agree with opposer that the symbol sought to be registered would be regarded as a 'stylized eagle.' Regardless, even in the unlikely event that a purchaser might conceivably associate applicant's design mark with an eagle, it would not be confused with the pictorial representations of eagles being used and/or registered by opposer..."); *Spaulding Bakeries Inc. v. Interstate Brands Corp.*, 209 U.S.P.Q. 355 (PTO 1980) ("Petitioner, as plaintiff herein, has had the burden of establishing facts and circumstances from which it may be concluded that the average purchaser of bread would be likely to equate respondent's mark with the term "OLD MILL.").

Although the doctrine of legal equivalents is a highly technical issue, it is paramount to the relevance of Applicant's alleged rights in the "ARNOLD" marks and Mr. Schwarzenegger's name. In its Counterclaim, Applicant alleges the following: "Schwarzenegger's fame and reputation is such that, when a mark approximating his likeness and identity is used without his authorization or consent on Universal Nutrition's bodybuilding-related goods or services, a connection with Schwarzenegger and/or Fitness Publications would be presumed." (Counterclaim, Dkt. No. 9, ¶ 39.) Applicant, however, does not allege that consumers would

associate either the “ARNOLD” marks or Mr. Schwarzenegger’s name with the Opposed Mark or the Bodybuilder Design. It is also important to note that neither the Bodybuilder Design nor the Opposed Mark include the term ARNOLD or Mr. Schwarzenegger’s name. Consequently, Applicant has not established any connection or relevance between its rights in the “ARNOLD” marks and Mr. Schwarzenegger’s name on the one hand and, on the other hand, the Bodybuilder Design, the Opposed Mark, or any of the claims alleged in its Counterclaim.

Moreover, Applicant’s applications for ARNOLD (Serial No. 86/496,501) and ARNOLD SCHWARZENEGGER MUSCLE BAR (Serial No. 86/340,887) are irrelevant to Applicant’s false suggestion claim because they were filed after the registration date for the Bodybuilder Design (*i.e.*, February 18, 2014). The false suggestion claim must be determined by deciding whether Universal’s Bodybuilder Design pointed to Applicant as of the time the registration issued, not as of the time of Applicant’s filing of its cancellation petition. *See Hornby v. TJX Cos. Inc.*, 87 U.S.P.Q.2d 1411, 1426 (TTAB 2008) (“the fame or reputation of petitioner must be determined as of the time respondent’s registration for TWIGGY issued”). Because Applicant’s above-referenced applications were filed after Universal’s Bodybuilder Design registered, these applications have no bearing or relevance whatsoever.

Last, Applicant states that Universal’s motion should be denied because Universal did not identify the specific language that it seeks to have stricken. (Opposition, p. 8.) While Universal disagrees with Applicant’s position, Universal has identified the language that it seeks to have stricken by highlighting the language in the document attached hereto as Exhibit A.

In sum, Applicant’s allegations concerning its rights in the “ARNOLD” marks and Mr. Schwarzenegger’s name do not have any connection whatsoever to the claims in this proceeding and should be stricken.

II. Mr. Schwarzenegger's likeness is not inherently distinctive for *any* good or service.

Applicant argues that its “inherently distinctive” affirmative defense is sufficiently pled and provides fair notice to Universal of the factual basis for its defense because Mr. Schwarzenegger's likeness is inherently distinctive with respect to *any* good or service and, at a minimum, Universal is on notice of Applicant's claim of inherent distinctiveness in the Opposed Mark with respect to the goods included in the application at issue (Serial No. 86/026,728). (Opposition, pp. 10-11.) It is fundamental trademark law that inherent distinctiveness is contextual. *Remington Prods., Inc. v. N. Am. Philips Corp.*, 892 F.2d 1576, 1580 (Fed. Cir. 1990) (the mark must be considered in context, *i.e.*, in connection with the goods); *see also Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, n.2 (9th Cir. 2002) (“An arbitrary mark is a common word that is ‘non-descriptive of any quality of the goods or services.’”); *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 976 (10th Cir. 2002) (“Arbitrary marks use common words, symbols, and pictures that do not suggest or describe any quality or characteristic of the goods or services.”). For example, APPLE when used in connection with computers is arbitrary and inherently distinctive, but APPLE is considered descriptive or generic when used in connection with food products.

In addition, a person's likeness is not inherently distinctive and, oftentimes, is not even protectable as a trademark or service mark. *See, e.g., ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 922 (6th Cir. 2003) (“Images and likenesses of Woods are not protectable as a trademark because they do not perform the trademark function of designation. They do not distinguish and identify the source of goods.”); *Pirone v. MacMillan, Inc.*, 894 F.2d 579 (2d Cir. 1990) (“a photograph of a human being, unlike a portrait of a fanciful cartoon character, is not inherently ‘distinctive’ in the trademark sense of tending to indicate origin”); *Presley's Estate v. Russen*,

513 F. Supp. 1339, 1364 (D.N.J. 1981) (stating that an image of Elvis Presley was not inherently distinctive, but it had acquired secondary meaning).

Finally, Applicant states that “Universal is undeniably on notice as to Applicant’s claim of inherent distinctiveness in the [Opposed Mark], *at a minimum*, with respect to the goods included in the application forming the basis of this opposition proceeding.” (Opposition, pp. 10-11.) The fact that Universal should be required to infer as to what goods or services the Opposed Mark is inherently distinctive underscores Universal’s argument: Applicant’s “inherently distinctive” defense fails to provide fair notice of the factual basis for the defense.

Based on the foregoing, Applicant’s arguments are unpersuasive and its “inherently distinctive” defense should be stricken.

III. Applicant’s affirmative defense repeating the allegations contained in Applicant’s Counterclaim contravenes the trademark rules.

The Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) clearly states that “[w]hen a defense is raised by way of a counterclaim, it should not also be pleaded as an affirmative defense, because the pleading of it as an affirmative defense is unnecessary and redundant.” TBMP § 311.02(b). Applicant also admits in its Opposition that its affirmative defense is redundant. (Opposition, p. 11.) In light of the TBMP rules and Applicant’s admission, this affirmative defense should be stricken.

IV. Applicant’s boilerplate “reservation of defenses” defense is an “unnecessary amplification” of Applicant’s defense.

In its Opposition, Applicant acknowledges that its “reservation of defenses” defense is a “customary boilerplate” reservation and an “unnecessary amplification” of Applicant’s defense. (Opposition, p. 12.) Moreover, aside from Applicant’s assertions that its defense is “customary in pleading practice,” Applicant has not provided any authority to support its position that the

defense provides Universal with fair notice of the pleaded defenses. Therefore, Applicant's "reservation of defenses" defense should be stricken.

V. CONCLUSION

For the reasons set forth above, Universal again requests that the Board strike Applicant's Counterclaim allegations concerning registrations, applications, and other statements relating to its purported rights in the "ARNOLD" marks or Mr. Schwarzenegger's name, as shown in the attached Exhibit A, and all of Applicant's Affirmative Defenses. Universal also requests that the Board suspend the proceedings pending consideration of Universal's present motion, and the deadlines for the initial discovery conference and all subsequent dates be reset accordingly.

Respectfully submitted,

Universal Protein Supplements Corporation
d/b/a Universal Nutrition

Dated: August 6, 2015

/Craig Beaker/
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CERTIFICATE OF SERVICE

I certify that OPPOSER'S REPLY IN SUPPORT OF MOTION TO STRIKE & SUSPEND PROCEEDINGS was served on Fitness Publications, Inc. by mailing a copy by first class mail, postage prepaid, to its attorney of record, David W. Grace, Loeb & Loeb LLP, 10100 Santa Monica Boulevard, Suite 2200, Los Angeles, California 90067-4120.

Dated: August 6, 2015

/Craig Beaker/

Craig A. Beaker

EXHIBIT A

introductory paragraphs contain factual allegations, Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations and, on that basis, denies those allegations.

1. Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 1 and, on that basis, denies those allegations.

2. With regard to paragraph 2:

(A) Fitness Publications admits: (i) That U.S. Reg. No. 4,483,690 (the “UN



Registration”) is for the mark ; (ii) that the UN Registration issued on or about February 18, 2014, that the UN Registration lists “Nutritional supplements for human consumption” in International Class 5, “Clothing, namely, hats, caps, bottoms, tops, shorts, pants, shirts, sweat shirts, sweat pants, sweat shorts, sweat jackets” in Class 25, and “On-line retail store services featuring health and diet-related products” in Class 35; (iii) that a first use date of 1998 was claimed by the applicant in the original application for the UN Registration; and (iv) that, as of the filing date of this Answer, “Universal Protein Supplements Corporation dba Universal Nutrition” is listed as owner of the UN Registration in the U.S. Patent & Trademark Office database.

(B) Fitness Publications admits: (i) That U.S. Reg. No. 3,555,885 (the “UNIVERSAL Registration”) is for the mark UNIVERSAL and design



; (ii) that the UNIVERSAL Registration issued on or about January 6, 2009, that the UNIVERSAL Registration lists “Supplements, namely, dietary food supplements, dietary supplements, food supplements, herbal supplements, meal replacement and dietary supplement drink mixes, mineral nutritional supplements, mineral supplements, nutritional supplements, powdered nutritional supplement drink mix, vitamin and mineral supplements, vitamin supplements, meal replacement bars” in International Class 5; (iii) that a first use date of 1980 was claimed by the applicant in the original application for the UNIVERSAL Registration; and (iv) that, as of the filing date of this Answer, “Universal Protein Supplements Corporation dba Universal Nutrition” is listed as owner of the UNIVERSAL Registration in the U.S. Patent & Trademark Office database.

(C) Fitness Publications admits: (i) That U.S. Reg. No. 3,568,919 (the “Red UNIVERSAL Registration”) is for the mark UNIVERSAL and design



; (ii) that the Red UNIVERSAL Registration issued on or about February 3, 2009, that the Red UNIVERSAL Registration lists “Supplements, namely, dietary food supplements, dietary supplements, food supplements, herbal

supplements, meal replacement and dietary supplement drink mixes, mineral nutritional supplements, mineral supplements, nutritional supplements, powdered nutritional supplement drink mix, vitamin and mineral supplements, vitamin supplements, meal replacement bars” in International Class 5; (iii) that a first use date of 1980 was claimed by the applicant in the original application for the Red UNIVERSAL Registration; and (iv) that, as of the filing date of this Answer, “Universal Protein Supplements Corporation dba Universal Nutrition” is listed as owner of the Red UNIVERSAL Registration in the U.S. Patent & Trademark Office database.

(D) Fitness Publications admits: (i) That U.S. Reg. No. 4,617,301 (the “Class 25 UNIVERSAL Registration”) is for the mark UNIVERSAL and design



; (ii) that the Class 25 UNIVERSAL Registration issued on or about October 7, 2014, that the Class 25 UNIVERSAL Registration lists “Athletic pants; Athletic shorts; Bottoms; Caps; Hats; Jackets; Pants; Shirts; Shorts; Sweatpants; Sweatshirts; Tops” in International Class 25; (iii) that a first use date of December 31, 1993 was claimed by the applicant in the original application for the Class 25 UNIVERSAL Registration; and (iv) that, as of the filing date of this Answer, “Universal Protein Supplements Corporation dba Universal Nutrition” is

listed as owner of the Class 25 UNIVERSAL Registration in the U.S. Patent & Trademark Office database

With respect to the remaining allegations in Paragraph 2, Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations and, on that basis, denies those allegations.

3. Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 3 and, on that basis, denies those allegations.

4. Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 4 and, on that basis, denies those allegations.

5. Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of paragraph 5 and, on that basis, denies those allegations.

6. Fitness Publications realleges and incorporates by references its responses to the allegations of paragraphs 1 through 5 as if fully set forth herein.

7. Fitness Publications admits that it filed Application Serial No. 86/026,728 on or about August 1, 2013, and that the application included “Dietary and nutritional supplements” in International Class 5. Fitness Publications admits that in an Allegation of Use, filed on or about November 19, 2013, Fitness

Publications claimed first use of the Fitness Silhouette Mark at least as early as October 2, 2013. With respect to the remaining allegations in Paragraph 7, Fitness Publications is without knowledge or information sufficient to form a belief as to the truth of any of the allegations and, on that basis, denies those allegations.

8. Denied.

9. Denied.

10. Denied.

AFFIRMATIVE DEFENSES

11. The Fitness Silhouette Mark is an actual likeness of Arnold Schwarzenegger, who is famous internationally as a professional bodybuilder. The likeness of Arnold Schwarzenegger is inherently distinctive. The average consumer is likely to associate the Fitness Silhouette Mark with Arnold Schwarzenegger.

12. Fitness Publications incorporates the allegations of the counter-claims referenced below.

13. Fitness Publications hereby reserves the right to amend its Answer to raise additional affirmative defenses as they become available or apparent to Fitness Publications through discovery in this matter or otherwise.

COUNTERCLAIM FOR CANCELLATION

14. Fitness Publications believes it is being damaged and will continue to be damaged by the maintenance of U.S. Registration No. 4,483,690 on the Principal Register.

15. Universal Nutrition has relied upon U.S. Registration No. 4,483,690 as a basis for opposing registration of the Fitness Silhouette Mark on the grounds of priority and likelihood of confusion under Section 2(d) of the Trademark Act.

16. Fitness Publications hereby petitions to cancel U.S. Registration No. 4,483,690, and, as grounds for cancellation, alleges as follows:

Fitness Publications' Famous "Arnold" Names and Marks

17. Arnold Schwarzenegger is a world famous actor, former governor of California, businessman, and former professional bodybuilder.

18. Schwarzenegger began weight training as a teenager, and won his first title in 1965. In 1967, at age 20, he first won the "Mr. Universe" title; he went on to win the "Mr. Universe" competition four more times. Schwarzenegger also held the title of "Mr. Olympia" seven times, most recently in 1980. The 1977 film *Pumping Iron* documents the story of Schwarzenegger's preparation for the "Mr. Olympia" contest. A 25th anniversary edition of the film was released in 2003.

19. Schwarzenegger is a published authority on the subject of bodybuilding. His books include:

- *Arnold: The Education of a Bodybuilder* (Simon & Schuster, 1977);
- *Arnold's Bodyshaping for Women* (Simon & Schuster, 1979);
- *Arnold's Bodybuilding for Men* (Simon & Schuster, 1981);
- *The Encyclopedia of Modern Bodybuilding* (Simon & Schuster, 1985);
- *Arnold's Fitness for Kids* (Doubleday, 1993); and
- The New Encyclopedia of Modern Bodybuilding : The Bible of Bodybuilding (Simon & Schuster, 1988).

20. Schwarzenegger's **name and** image are iconic in the sport of bodybuilding. Since 1989, Schwarzenegger's legacy has been commemorated annually in the "Arnold Classic" bodybuilding competition. He has been depicted on the cover of more than 1,000 magazines, many of which were associated with bodybuilding, sports, and fitness. In the early 1990s, Schwarzenegger was featured in a weekly fitness Q&A column in *USA Weekend* entitled "Ask Arnold" which reached 33.5 million readers. He has made hundreds of film and television appearances as himself. He has also released videos in the fields of bodybuilding and fitness, including "Shape Up With Arnold", which was released in 1983. For many years, Schwarzenegger wrote a monthly column for *Muscle & Fitness* and *Flex*, and he is currently serving as executive editor of both publications.

21. The **name and the likeness** of Schwarzenegger (including without limitation the following likenesses) are famous with respect to bodybuilding.




22. Schwarzenegger's **name and** likeness have been famous with respect to bodybuilding since prior to the filing date of Universal Nutrition's application to register the mark depicted in the UN Registration, as well as prior to the date of first use of that mark claimed by Universal Nutrition in its application to register the UN Registration.

23. Since retiring from the sport of bodybuilding, Schwarzenegger has achieved celebrity as a film and television actor, and as the Governor of California from 2003 until 2010.


24. Schwarzenegger is a recognized authority in the areas of fitness and nutrition. The Arnold Fitness Expo – held during the annual Arnold Sports Festival – features over 800 exhibition booths showcasing the latest in sports equipment, apparel, and nutrition as well as a stage that hosts unique, non-stop competitions, and entertainment.

25. With the consent of Schwarzenegger, Fitness Publications has obtained federal trademark protection for Schwarzenegger's **name and** likeness

and it is the owner of the following federal trademark registrations, among others (the “Schwarzenegger Image Registrations”):

Mark	Registration Date	Reg. No.	Goods/Services
	4/20/2004	2833705	Clothing and headwear, namely, t-shirts, shirts
THE ARNOLD SCHWARZENEGGER CLASSIC	12/19/1989	1572499	Entertainment services in the nature of weightlifting and body building competitions
ARNOLD CLASSIC	2/13/2007	3208453	Entertainment services in the nature of fitness and bodybuilding competitions
ARNOLD SPORTS FESTIVAL	1/2/2007	3192055	Entertainment in the nature of demonstrations of athletic skills

26. With the consent of Schwarzenegger, Fitness Publications has also applied for federal trademark protection of Schwarzenegger’s name and likeness, including the pending applications listed below (the “Schwarzenegger Image Applications”)(collectively, with the Schwarzenegger Image Registrations, the “Schwarzenegger Image Marks”):

Mark	Filing Date	Serial No.	Goods/Service
	8/1/2013	86026728	Dietary and nutritional supplements.
ARNOLD	1/6/15	86496501	Dietary and nutritional supplements
ARNOLD SCHWARZENEGGER	8/1/2013	86026727	Dietary and nutritional supplements.
ARNOLD SCHWARZENEGGER MUSCLE BAR	7/18/2014	86340887	Nutritional supplements, namely, high-protein bars.
ARNOLD SCHWARZENEGGER BLUEPRINT	2/18/2014	86197124	Dietary and nutritional supplements; Educational services, namely, conducting classes and programs in the field of fitness and nutrition; physical education; physical fitness education and training; providing information in the field of fitness and nutrition; Dietary and nutritional guidance; providing information about dietary supplements and nutrition
ARNOLD SCHWARZENEGGER BLUEPRINT TO CUT	2/18/2014	86197131	Dietary and nutritional supplements; Educational services, namely, conducting classes and programs in the field of fitness and nutrition; physical education; physical fitness education and training; providing information in the field of

Mark	Filing Date	Serial No.	Goods/Service
			fitness and nutrition; Dietary and nutritional guidance; providing information about dietary supplements and nutrition
ARNOLD SCHWARZENEGGER BLUEPRINT TO MASS	2/18/2014	86197133	Dietary and nutritional supplements; Educational services, namely, conducting classes and programs in the field of fitness and nutrition; physical education; physical fitness education and training; providing information in the field of fitness and nutrition; Dietary and nutritional guidance; providing information about dietary supplements and nutrition

27. Fitness Publications has used some of the Arnold Marks in commerce in the United States in connection with the goods and services listed in the registration certificates since prior to the filing date of Universal Nutrition's application to register the mark depicted in the UN Registration, as well as prior to the first use date claimed by Universal Nutrition in the mark depicted in the UN Registration.

Universal Nutrition's Bodybuilder Design

28. Universal Nutrition's mark which is the subject of the UN Registration depicts the silhouette of a flexing male bodybuilder.

29. On its website at www.universalusa.com, Universal Nutrition describes its brand as the “one name that is on the lips of serious and dedicated bodybuilders intent on sculpting and chiseling that perfect physique.” The goods and services in Universal Nutrition’s registration are all related to bodybuilding and marketed and advertised specifically to the bodybuilding community.

30. Neither Arnold Schwarzenegger nor Fitness Publications is connected with the activities performed by Universal Nutrition under the mark depicted in the UN Registration. Neither Arnold Schwarzenegger nor Fitness Publications has authorized or consented to registration of the mark in the UN Registration.

Merely Descriptive
(Trademark Act Section 2(e)(1))

31. Whereas the Fitness Silhouette Mark depicts the likeness of the famous bodybuilder Arnold Schwarzenegger, the mark in the UN Registration merely depicts a generic bodybuilder silhouette.

32. Upon information and belief, it is relatively common in the marketplace to use the image or design of a bodybuilder in connection with goods and/or services targeting the bodybuilding community.

33. As used on and in connection with the offering of goods and services intended for use by bodybuilders, the mark in the UN Registration is merely descriptive.

Failure To Function As A Mark
(Trademark Act Section 1)

34. The mark depicted in the UN Registration does not function as a trademark for the goods and services listed in the registration, but is merely ornamental or informational as applied to Universal Nutrition's goods and services.

35. Upon information and belief, Universal was not using the bodybuilder design as a mark as of the filing date of its application to register the mark with the U.S. Patent & Trademark Office.

36. Upon information and belief, Universal was not using the bodybuilder design as a mark as of the date of first use claimed by Universal in its application to register the mark with the U.S. Patent & Trademark Office.

37. Upon information and belief, consumers are not likely to view Universal Nutrition's bodybuilder design as signifying the source or origin of the goods or services in connection with which it is used.

False Suggestion Of A Connection
(Trademark Act Section 2(a))

38. Arnold Schwarzenegger's likeness and identity was famous prior to both the January 8, 2013 filing date of the application for federal registration of Universal Nutrition's bodybuilder design and the 1998 date of first use in commerce claimed by Universal Nutrition in its application.

39. Universal Nutrition claims in its First Amended Notice of Opposition filed on March 24, 2015 and its Notice of Opposition filed on December 29, 2014 that the mark in its UN Registration and the Fitness Silhouette Mark are likely to be confused by the public. If this contention were accurate, then such confusion would be likely only because Universal Nutrition's mark is a close approximation of Schwarzenegger's likeness and/or identity. Schwarzenegger's fame and reputation is such that, when a mark approximating his likeness and identity is used without his authorization or consent on Universal Nutrition's bodybuilding-related goods or services, a connection with Schwarzenegger and/or Fitness Publications would be presumed.

40. Upon information and belief, if the allegations of Universal Nutrition are true, then Universal Nutrition's selection of the mark depicted in U.S. Reg. No. 4,483,690 was intended to and/or does create a false association with Schwarzenegger.

PRAYER FOR RELIEF

WHEREFORE, Fitness Publications respectfully prays:

A. That Universal Nutrition's petition be denied and this Opposition Proceeding be dismissed;

B. That U.S. Registration No. 4,483,690 be cancelled and that Fitness Publications' Counterclaim Petition For Cancellation be sustained in favor of Fitness Publications;

C. In the alternative, that U.S. Registration No. 4,483,690 be partially cancelled with respect to International Class 5, International Class 25 and/or International Class 35.

Dated: May 27, 2015

Respectfully submitted,

LOEB & LOEB LLP

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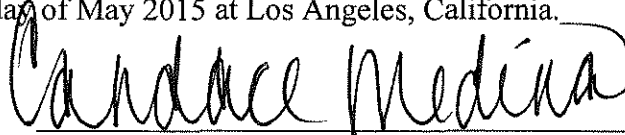
Attorneys for Applicant,
Fitness Publications, Inc.

CERTIFICATE OF SERVICE AND MAILING

It is hereby certified that a copy of the foregoing ANSWER AND COUNTERCLAIM is being deposited with the United States Postal Service, first-class postage prepaid, in an envelope addressed to:

Maureen Beacom Gorman
Marshall Gerstein & Borun LLP (31742-12282-L)
233 South Wacker Drive Suite 6300
Chicago, IL 60606

Executed this 27th day of May 2015 at Los Angeles, California.


CANDACE MEDINA